PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 27 | Issue 1

6-1923

Dickinson Law Review - Volume 27, Issue 9

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation
Dickinson Law Review - Volume 27, Issue 9, 27 DICK. L. REV. 242 ().
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol27/iss1/9

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Dickinson Law Review

Vol. XXVII JUNE, 1923 No. 9

EDITORS:
Paul L. Hutchison
Mrs. Eleanor F. Stevenson
W. Eugene Whitlinger
Robert H. Henderson
Joseph F. Ingham

BUSINESS MANAGERS:
William T. Reynolds
Julian W. Barnard
Clayton H. Hoffman
Anthony Cavalcante
Carl A. Strait

Subscription Price $1.50 per Year

SOME MATTERS OF PRACTICE[1]

The doctrine of Caveat Emptor applies to judicial sales of land with even greater force than to sales of land which are the culmination of negotiations between vendor and purchaser. A judicial sale can convey only such interest as the debtor may have in the land and the purchaser must satisfy himself as to what that interest is. Wells v. Van Dyke, 106 Pa. 111.

The policy of the law, however, is to encourage bidding at sheriff's sales by protecting purchasers from certain irregularities in the process leading up to the sale. The Act of 1705, 1 Sm. L. 61, and numerous later acts were passed to protect purchasers at execution sales of land against every defect or irregularity except when judgment is void on its face or when there is entire absence of anything in the sheriff to make a sale. Shannon v. Newton, 132 Pa. 375. The Courts likewise have laid down the general rule that irregularities in the process leading up to the sale are cured by the confirmation of the sale and that objection must be made thereto before such confirmation, that is, by the acknowledgment of the sheriff's deed, formerly in open court and now, by the Act of April 23, 1905, P. L. 265, before the prothonotary or deputy prothonotary, but not ear-

[1]Having followed carefully the suggestions of Mr. Sellers in "Some matters of Practice," Vol. XIX., Dickinson Law Review, page 233, the "young and inexperienced lawyer" finds more pitfalls in the path as he proceeds after execution to sale of the defendant's property.

lier than the return day of the writ under which the sale was made.

DEFECTS NOT CURED BY ACKNOWLEDGMENT OF DEED

The purchaser is bound by everything appearing on the face of the record and is therefore not protected in purchasing property under a judgment which is void on its face. (Caldwell v. Walters, 18 Pa. 79—Judgment of married woman prior to 1887). The purchaser's title is subject to attack at any time on ground of fraud by the purchaser (Evans v. Maury, 112 Pa. 300) but a bona fide purchaser from the fraudulent purchaser acquires a valid title.

The acknowledgment of the deed before the return day (Glancey v. Jones, 4 Yeates 212) or a sale on a lian which had been previously discharged (Leeds v.Artzt, 2 W. N. C. 507) can be set up after confirmation of the sale to avoid the sale.

DEFECTS CURED BY ACKNOWLEDGMENT

Although a sale on a judgment, which is void because of defendant being a married woman, is void and not affected by acknowledgment (Wells v. Van Dyke, 106 Pa. 111), the confirmation of the sheriff's sale by acknowledgment in open court is complete protection to the purchaser when defendant in judgment was declared a lunatic as of date prior to entry of judgment against him. Shannon v. Newton, 132 Pa. 375. This apparent contradiction is explained by the fact that the defect in the first case appears on the record while in the latter case there is nothing on the record to warn the purchaser.

The sale of corporate property of a public service corporation under a common fi. fa., instead of a special fi. fa. under the Act of 1870, (P. L. 58), is only irregular and must be complained of before confirmation. Lusk's Appeal, 108 Pa. 152. But where the interest of a life ten-

ant is sold under a fi. fa., instead of under a vend. ex. with notice and leave of court, the sale is not merely irregular but void and the purchaser acquires no title. Henry v. McClellan, 146 Pa. 34.

The issuance of execution before entry of judgment is an irregularity cured by acknowledgment of the deed (Clough v. Welsh, 229 Pa. 386); likewise a failure to hold an inquisition or to condemn the land prior to sale (Clough v. Welsh, 229 Pa. 386); or the failure to deliver a testatum fi. fa. to the prothonotary of the county to which the same is issued and record it in his office under Act of 16 June, 1836 P. L. 775. Mencke v. Rosenberg, 202 Pa. 131.

If the purchaser refuses to pay the purchase price the sheriff may refuse to return the sale and acknowledge the deed; but if he acknowledge the deed the title passes to the purchaser who becomes indebted for purchase price and at most the sheriff has an equitable lien on a property by holding the deed.

RIGHT OF PURCHASER TO RELY ON RECORD

The purchaser is bound to examine the grantor and mortgagor indices in the office of the recorder of deeds as to every owner of whom he has record or actual notice; but he is not required to examine grantee and mortgagee indices. Pyles v. Brown, 189 Pa. 164. The duty to see that the instrument under which he claims is properly recorded is on the grantee or mortgagee and defective indexing or recording is fatal to the conveyance or mortgage as against subsequent purchasers or mortgagees. Prouty v. Marshall, 225 Pa. 570.

The fact that a lien has been paid does not affect a purchaser if the record does not show satisfaction. Thus where the record showed a judgment as the first lien followed by a mortgage, the judgment having in fact been paid, the purchaser at the sale on execution on a subsequent judgment acquired the land discharged of the mortgage. Saunders v. Bould, 134 Pa. 445. The purchaser is not

affected by notice of a proceeding to open judgment pending at the time of sale. Meigs v. Bunting, 141 Pa. 233. Likewise a judgment marked satisfied, but actually unpaid, is to be treated as satisfied by the purchaser even though a rule to strike off satisfaction be pending. Coyne v. Souther, 61 Pa. 455.

JUDGMENT AND MORTGAGE INDICES

The purchaser's knowledge of the record must depend upon his examination of the indices of judgments and mortgages. As to mortgages he must take notice of the surname and family name of the debtor and examine any mortgage in which these names appear, disregarding the middle initial or letter. Land descended to Herman Bergold from his father. As Herman A. Bergold, he executed a mortgage to Hickey. Two years later as Herman Bergold, not using the middle initial, he sold to Flick on scire facias. On the mortgage Flick defended on the ground that he had no notice of the mortgage. The purchaser, the court held, was bound to take notice of the mortgage of Herman A. Bergold. Crippen v. Bergold, 258 Pa. 469.

In the case of a difference between the first name or initial of the mortgagor as it appears in the mortgage and as it appears in the deed to him, a purchaser of the premises is not affected with notice of the mortgage (Prouty v. Marshall, 225 Pa. 570) and purchases the same discharged of the mortgage.

The rule as to the judgment indices, however, is different. Harry L. Halpern was owner of real estate subject to the following liens: (1), Judgment entered against Harry Halpern; (2), mortgage against Harry L. Halpern; (3), judgment against Harry L. Halpern. On execution on No. 3, the property was sold. Later a scire facias was issued on the mortgage (No. 2) and the terre tenant defended on the ground that judgment No. 1, having been discharged by the former sale, the mortgage following the first judgment was also discharged. It was held, however, that a judgment entered against Harry Halpern was not

notice of a lien against Harry L. Halpern. The mortgagee (No. 2) had no notice of the judgment (No. 1), he being bound to examine the records only as to the name of the owner as set forth in the deed of conveyance to him. The purchaser at the execution sale is bound by the record and not by notice of facts outside the record. As to the mortgagee the first judgment was not a lien and therefore the mortgage was not discharged.

The purchaser erred in relying upon knowledge or assumption that Harry Halpern and Harry L. Halpern were the same person and purchased the land subject to the mortgage which he naturally believed to have been discharged by the sale. Pennsylvania Co. v. Halpern, 273 Pa. 451.

The purchaser at a judicial sale takes subject to the right of a tenant whose lease was prior to the date of recording of the mortgage upon foreclosure of which sale was made. But if the mortgage is prior to the lease the fact that the foreclosure is made merely in order to defeat the lease does not avail the tenant. Roush v. Herbick, 269 Pa. 145.

If the judgment is reversed after the sale of the defendants land he is entitled to a writ of restitution as to the purchase price of the land only. Even if the judgment plaintiff is the purchaser the restitution is of the purchase price only. Lengert v. Chaninel, 208 Pa. 229.

MOOT COURT

HOPPER v. STRONG

Sales—Executory Sales—Damages—Measure of Damages

STATEMENT OF FACTS

Strong contracted to deliver 100 baskets of peaches at $1.50 a basket. He failed to deliver them or any part of them. Hopper alleges this failure and proves that peaches of this quality were at the time of delivery selling for $2.00 per basket. He sues in assumpsit for $.50 x 100. He did not show that he bought other peaches and paid $2.00 per basket. The court entered a non-suit which it refused to take off.

Kline, for the Plaintiff.

Kreider, for the Defendant.

OPINION OF THE COURT

KEENER, J. This is an appeal by the plaintiff from order of Common Pleas Coure, refusing to take off non-suit.

There are two questions to be decided in this case. 1st. What is the measure of damages for the seller's failure to deliver? 2nd. After having proved the market price at time and place of delivery must buyer also show that he went into the market and purchased in order that he may recover his damages?

After reviewing the Pa. reports and statutes we find the law concerning the first question to be as provided in Clause 3, Sec. 7, of the Sales Act of 1915. (P. L. 543). "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at time of refusal to deliver."

This section of The Sales Act of 1915 is construed and supported in the two recent cases. Seward v. Pa. Salt Mfg. Co., 266 Pa. 457, and Iron Trade Products Co. v. Wilkoff Co., 272 Pa. 172.

Sedwick on Damages, Vol. 2, Sec. 734, states this as being the general rule both in England and United States, citing among his American authorities numerous Penna. cases so holding. This is

also stated by Williston as being the rule. Sec. 599, Williston on Sales.

Circuit Judge Baker in the case of B. & O., C. T. R. Co. v. Becker Milling Co., 272 Fed. Rep'r. 936, held, "That the buyer is entitled to compensation for such breach. The loss is measured by the distance between the contract price at one end and the market price as evidence of the market value at the other."

The rule as laid down in Hauptman v. Pa. W. Home for Blind Men, 258 Pa. 427, is the following: "Upon a breach of contract by vendor in failing to furnish his vendee goods contracted for, the latter is entitled to recover compensation for his loss, and that loss is measured by the difference in the market value of the goods the vendor had contracted to furnish and the contract price which he had agreed to accept. The law is not concerned to inquire whether the vendee supplied from other sources the goods the vendor agreed to furnish nor does it concern the vendor. This was also held to be the law in the recent case, supra, 272 Pa. 172. These cases very ably answer the second question.

The learned counsel for the defendant by an ingenious argument aims to attack the reasonableness of the rule. This argument we cannot support. We think the party at fault cannot be heard to complain of the remedy afforded, which is as reasonable and just as it is in the case at bar. There may be cases where the rule might prove inadequate and unfair but this is not so in the present case. The case cited by the counsel for the defendant, Morris v. Supplee, 208 Pa. 253, differs substantially from the present case, in that it appeared that the plaintiff had supplied himself with the goods elsewhere at less cost.

In view of the authorities above stated to support the law on these points, and the fairness with which it applies to the case at bar, we find that the learned court below erred in refusing to remove the non-suit and judgment must be entered for the plaintiff.

Judgment reversed.

OPINION OF THE SUPREME COURT

The sales act of 1915, 6 Purd. Dig. p. 7483, provides that the buyer may recover damages, for failure of the seller to deliver the goods, and designates the measure of damages, the difference between the price agreed upon and the higher price current in the market at the time when the goods should have been delivered. It says nothing of the purchase of similar goods by the vendee, to take the place of the goods purchased which the vendor has refused to deliver.

The vendee may have various reasons for not having bought similar goods, into which it would be irrelevant to make inquiry.

So says Justice Stewart, "The law is not concerned to inquire whether the vendee supplied from other sources, the goods the vendor had agreed to furnish, nor does it concern the vendor." Hauptman v. Home for Blind Men, 258 Pa. 427.

This is the conclusion of the learned court below which must be affirmed.

STODDARD v. SPENCER

Trespass—Malicious Prosecution—Evidence—Burden of Proof—Advise of Counsel—Nolle Pros—Probable Cause

STATEMENT OF FACTS

Spencer, employer of Stoddard, believed that the latter had stolen money from him, and prosecuted him for larceny.

Before doing so, he stated facts, which induced him to suspect guilt, to the District Attorney, who advised him that he ought to prosecute. There were other facts which weakened the force of those facts, but these were not disclosed to the attorney. After the indictment was brought, a nolle pros was entered.

The court in this action for trespass for malicious prosecution, said that the entering of a nolle pros. was an indication of want of probable cause, and that the omission to state some of the facts which lessened the probative value of the facts stated, prevented the advise of counsel from making negative the malice. Verdict for plaintiff.

Wertacnik, for the Plaintiff.

Gelber, for defendant.

OPINION OF THE COURT

ZIEGLER, J. We must first consider what elements are necessary to justify an action for trespass for malicious prosecution. In Pennsylvania the defendant must have falsely, maliciously, and without probable cause charged the plaintiff with the commission of a crime. Secondly, a warrant must have thereupon been issued; and thirdly, the plaineiff must have been taken into custody. Barry v. Pennsylvania Salt Co., 8 W. N. C. 309. That the two latter elements were present is admitted. Therefore, in order for the plaintiff to be successful in this suit, the presence of the first element must be proved.

In making out his cause of claim, the plaintiff points out that the termination of a criminal prosecution by the entry of a nolle pros. is prima facie evidence of lack of probable cause. The law in Pennsylvania is well settled on this point. The court in Murphy v. Moore, 9 Sadler 64, states absolutely and unequivocally that the entry of a nolle pros. without the knowledge and consent of the plaintiff in the action of malicious prosecution is a sufficient

ending of the prosecution to entitle the plaintiff to maintain the action. This is reiterated in Swartz v. Bortree, 253 Pa. 310.

At this point the burden of proof shifts to the defendant to show that he had probable cause. This is brought out in a case so recent as Davis v. Wilhelm and Bonnett, 76 Sup. 396. There it is held that the mere offering of the record of discharge by a magistrate is sufficient to shift the burden of proof upon the defendant to show that he had probable cause. The nolle pros. in the case at bar is akin to the discharge in a magistrate's office.

The defendant now cites Laughlin v. Clawson, 27 Pa. 328, as authority for the proposition that an action for malicious prosecution cannot be sustained, if an officer of the state, appointed because of his legal learning, considers that a given state of facts is sufficient evidence of probable cause. This case, however, also holds that these statements must be proved to be the true facts. This brings us to the failure of the defendant to disclose some of the facts. It is admitted that the defendant failed to disclose facts, which, had the District Attorney known them, would have caused him to give contrary advise. Thus the conclusion is reached that the proposition stated by the court in Laughlin v. Clawson, supra, does not constitute a defense.

Failing here, the defendant turns to foreign jurisdiction to show that the just rule is that the dismissal of prosecution by a prosecuting attorney without a hearing before justice does not make out a prima facie case of want of probable cause. The courts of the same jurisdiction, however, hold that evidence of the fact that an attorney upon a full and fair representation of facts advised the prosecution does not establish the existence of probable cause. These decisions, therefore, tend to leave one confused upon the subject of probable cause, as there is no decision one way or another. The active concealment, then, on the part of the defendant, of important facts which weakened his case, throw the balance against the defendant.

The defendant has failed to show probable cause. Going further, the law in Pennsylvania is that malice may be inferred from want of probable cause. Miller v. Hammer, 141 Pa. 196; Herr v. Lollar, 268 Pa. 109. The entering of the nolle pros. would lead one to believe that the chances of pursuing the prosecution to a successful conclusion were rather vague in the mind of the defendant. Why, then was the prosecution started? The trend of Pennsylvania decisions seems to infer malice.

That the defendant did not disclose material facts which he knew would have an important bearing on the case is falsity in itself. Therefore, the plaintiff has made out all the elements of malicious prosecution, and despite the able argument of the coun-

sel for defense, the decision of the learned court below is affrmed.

OPINION OF THE SUPREME COURT

The prosecution was ended by the entry of a nolle prosequi. This is not decisive, however, that there was no probable cause, apparent at the institution of the prosecution. Facts later discovered, may have changed the purpose of the District Attorney and of the prosecutor.

Apparently, the facts, if fully revealed to the District Attorney, would have dissuaded him from abetting the prosecution. But, he recommended it. His opinion that a larceny had been committed, was produced by a statement of facts made to him by Spencer which was, if not untrue, incomplete, and the omitted facts required, when known, a different interpretation of the revealed facts. advice of counsel, after a full disclosure of facts, is a complete defence for the prosecutor, but there must be a complete and accurate statement of all the facts known to him at the time. 11 Pa. L. Dig. Col. 19415. Jaggard on Torts, Vol. 1, p. 621. Swartz v. Bortree, 253 Pa. 304.

The verdict virtually finds that the plaintiff was innocent of the crime with which he was charged, and that the facts known to the defendant were not such as to repel the hypothesis that he was acting precipitately, too eagerly, maliciously, in beginning the prosecution.

The judgment of the learned court below is

AFFIRMED.

KING v. SOLWAY

Nuisance—Public Nuisance — Dynamite — Negligence—Damages—Measure Thereof

STATEMENT OF FACTS

King, owning an office building, let a room in it to Solway for an office. Without King's consent, Solway put 50 pounds of dynamite in the room. There was also a stove in the room with fire in it. An explosion occurred which destroyed the building. King alleges (a) that putting the dynamite in the room was creating a nuisance, for the result of which Solway was liable, negligent or not; (b) in that the act was in itself negligent; (c) that the difference between the value of the premises before and after the explosion was the measure of damages. A witness was allowed to express an opinion of the value of the premises before the explosion, but on cross-examination said that his opinion was derived from the

evidence of the rentals for the last three years before the accident. A motion to strike out this evidence was refused.

Verdict for plaintiff for $3000.00.

Goodman, for the Plaintiff.

Gans, for the Defendant.

OPINION OF THE COURT

INGHAM, J. The first question to be considered in the case presented by the argument, is whether or not the defendant, Solway, by placing the dynamite in the room in the manner set forth, created a nuisance. If so, he is liable for all the consequences naturally flowing from his act, irrespective of the question of negligence upon his part thereafter.

A study of the cases in this State on the subject, from the time of Wier's Appeal, 74 Pa. 230, down to date, leads one to the conclusion that the mere possession or storage of high explosives is not in and of itself a public nuisance, even though it may subject property or person to a risk of injury, because the use of explosives is so essential to the proper development of our industries; and the risk to those who come into contact with it, is necessarily incident to the prosperity of our large industries. It appears that the beneficial purpose for which the explosives are intended may justify its possession on the ground of economic necessity.

It clearly appears, however, that the possession of explosives may become a public nuisance in either of two ways: When such possession or storage falls within the express prohibition of a statute; or when, by force of the surrounding circumstances, such as the density of population, the manner of storage, the nature and quantity of the explosive, etc., one can reasonably conclude that the situation of peril and likelihood of injury to the person or property of others, created by such storage, was incommensurate with the legal right of the defendant to have and keep such explosives.

With the exception of the Act of March 20, 1855, the provisions of which are confined to the city of Philadelphia, there is no statute in this State which would prohibit the keeping or storing of explosives as was done in this case. If, therefore, we are to find that a nuisance was created, it must be from the circumstances surrounding the act of the defendant.

When dynamite is stored under circumstances which have been found to amount to a public nuisance, the necessity for establishing negligence in the act immediately causing the explosion is dispensed with. It has been stated that: "It is sufficient to prove facts which justify the finding of a public nuisance, and when the explosion is a thing that could naturally flow therefrom, then, since

that possibility is one of the very elements that go to make up the nuisance, in the absence of evidence to the contrary, the explosion will be assumed to have followed as a result thereof." Forster v. Rogers Brothers, 247 Pa. 54.

While the proposition above stated is true, yet it does not follow that negligence is never considered when the basis of the recovery is the existence of a condition amounting to a nuisance. Negligence may be, and often is, a material factor in the creation of a condition, the establishment of which determines the existence of a nuisance. In other words, a person may violate a legal duty to use care in his conduct by bringing dynamite into a building occupied by others, and in so doing create a nuisance by his negligence. He will then be liable for injury occasioned by a purely accidental explosion of the dynamite, without regard to the fact that he may have used the highest degree of care in handling it thereafter.

The principle of 'balancing conveniences', must be applied by the courts in a situation where two legal rights conflict. This principle is never more apparent than in the cases which deal with the question of whether or not a certain business or occupation is such as warranted violation of the rights of others as to constitute a nuisance. The surrounding circumstances are considered and if, in the opinion of the court in the particular case, the economic demand of the community justifies the continued existence of the business, even in the face of certain loss to the individual or group, the right of the latter must yield. The phrase "damnum absque injuria" finds frequent application in the courts today.

In many of the cases relied upon by the defendant, where a nuisance was held not to have existed, this principle of 'balancing conveniences' can be traced, and in nearly every case dealing with the question, some allusion to it appears.

In the present case the verdict leaves no room for doubt that the circumstances surrounding the act of the defendant made his right to the keeping of dynamite in the place and manner stated, inconsistent with the extreme risk of injury consequent thereto. When we take into consideration the highly explosive nature of dynamite, and the fact that it was kept in one of the rooms of an office building in close proximity to a stove, we feel that the verdict of the jury correctly supports the contention that a nuisance has been created.

As was stated in Forster v. Rogers Brothers, supra: "No particular causal act of negligence contributing to the explosion need then be shown" so the verdict for the plaintiff can be supported without evidence that any negligence of the defendant actually caused the explosion, there being no evidence to the contrary. A

presumption like this may be said to be a necessity in this class of cases because of the extreme improbability of receiving the testimony of a witness who saw the dynamite explode.

The second contention of the plaintiff can also be supported. Sowers v. McManus, 214 Pa. 244, states: "While the possession of dynamite to be used for a lawful purpose is neither unlawful nor negligent, the person in possession of it is, as to third parties, bound to the highest degree of care, and a failure to take any reasonable precaution to prevent explosion of it while in storage is negligence." This language was quoted with approval in Derry Coal Co. v. Kerbaugh, 222 Pa. 448, a case in which the defendant was held liable for an explosion where the only evidence was that dynamite was kept in a small room containing a stove. Mr. Justice Fell, in the above case says: "The presence of a red-hot stove in a small building and within a few inches of the dynamite, and of explosive caps on the floor was, under the testimony, an unsafe condition, from which an explosion might result....No explanation of the cause of the explosion was furnished by the defendant and it was left to the jury to accept the theory of the plaintiff, based on affirmative evidence of negligent acts, or that of the defendant of an unaccountable accident." A statement more appropriate to the facts of the present case would be difficult to find.

The third question relates to the measure of damages. The explosion destroyed the building and the injury was certainly of a permanent nature. We regard the rule as well settled in this State that when the injury is of a permanent nature, the measure of damages is the actual deterioration of the property in value, or the difference between the value of the premises before and after the explosion. Miller v. Hanover Water Co., 240 Pa. 393; Forster v. Rogers Brothers, 247 Pa. 54; Sebree v. Huntingdon Water Co., 267 Pa. 420.

While it is true that the test used in determining the measure of damages was quite correct, yet the means by which the market value was ascertained cannot be so regarded. The witness who testified as to the market value, basing his opinion solely upon rentals for the past three years, was clearly incompetent, and if objection to his testimony was properly made, it should have been stricken out.

The rule in this State is too well settled to admit of question that the only basis upon which a witness may state an opinion as to the value of real estate is a personal knowledge of the property and of property in the vicinity, and a knowledge of the general selling price of lands in the neighborhood. Such knowledge must be based, not upon evidence of particular sales of similar property, but upon a knowledge of the price at which lands are generally

held for sale and sometimes sold, in the neighborhood. To this effect are: Pittsburg Railways Co. v. Vance, 115 Pa. 325; Michael v. Crescent Pipe Line Co., 159 Pa. 99; Friday v. Penna. R. R. Co., 204 Pa. 405.

There remains but one point to be disposed of, and which may be said to determine the question of whether or not a new trial is to be granted. This has to do with the time for making objection to the testimony of an incompetent witness. The rule enunciated by Chief Justice Von Moschzisker in Forster v. Rogers Brothers, supra, is as follows: "When irrelevant or incompetent testimony is elicited by questions which are not objected to at the time they are put, and the trial is permitted to proceed with this testimony upon the record, a refusal of a request to strike it out, made after the witness has left the stand, will not be reviewed; in such a case the only course is to ask that the jury be instructed to disregard the testimony, and a refusal of this request will be assigned for error."

The motion to strike out need not be made immediately upon receipt of the answer of the witness, but will be sufficient if made after the cross-examination has revealed the inherent defect in the testimony on direct examination. This seems the only fair interpretation, as one of the chief objects in the cross-examination of an opinion witness is to show that his opinions are incorrectly founded.

It does not appear that the motion to strike ou the incompetent testimony was made after the witness had left the stand, and we cannot infer that such was the true situation. In all justice and fairness to the counsel for the defendant, we cannot presume that he slept upon his rights and permitted the witness to leave the stand without a motion to strike out his testimony after its glaring incompetency had been exposed by his own questioning.

We must therefore hold that the motion was properly made, and as the testimony has been shown to have been clearly incompetent, the refusal to grant the motion to strike out was error. On this ground, and on this ground alone, the motion of the defendant's counsel for a new trial of this cause is granted.

OPINION OF THE SUPREME COURT

The opinion of the court below is so well written and so well supported by authorities, that scarcely anything can profitably be added to it.

The negligence, if any, consisted in storing the dynamite in the room under its existing conditions which made explosions not sufficiently improbable. A more specific negligence it would be unnecessary to discover.

The value of the building before and its value after the explosion, furnish the difference of value for which, if at all, the defendant is liable. The rentals for three years could no more be accepted as a criterion of value than the price at which the property had been sold if it had been sold, could be.

The learned court below follows Forster v. Rogers Brothers, 247 Pa. 54, in making an impalpable distinction between striking out evidence and directing a jury to disregard it. The distinction has been often made, but never elucidated. In jury trials, there is nothing of evidence to "strike out." There was no record at common law of the evidence, except in the minds, the memories of the jurors, and yet it became the fashion to speak of "striking out" evidence, and instructing that it be disregarded. The distinction is futile, and it would not be regrettable, if it passed into a long oblivion. What is wanted, when evidence has been improperly heard by the jury, is, that they should expunge it from memory. It matters little, whether the act by which they are induced to do this, be called a striking out, or an instruction to disregard.

The able opinion of the learned court below makes discussion by us unnecessary.

The judgment is AFFIRMED.

MILLS v. R. R. CO.

Negligence—Trespassers on Trains—Ejection of Trespassers From Moving Trains—Liability of Master—Scope of Employment—Case for Jury

STATEMENT OF FACTS

Mills, a lad of 14, got on the top of a freight car, intending to steal a ride to a point five miles off. When the train was in motion, a brakeman coming along the top of the cars observed him and menancingly commanded him to get off. The boy attempted to get off but lost his hold on the ladder, fell and was seriously hurt. While brakemen were required by the R. R. Co. to drive off trespassers, they were forbidden to do so while the trains were in motion. A verdict of $3000 was nevertheless recovered. Appeal.

Grist, for the Plaintiff.

Feinstein, for the Defendant.

OPINION OF THE COURT

HARKINS, J. Mills, the plaintiff, a lad of fourteen, got on the top of a freight car, intending to steal a ride to a point five miles off. When the train was in motion, a brakeman coming

along the top of the cars observed him and menacingly commanded him to get off. The boy attempted to get off but lost his hold on the ladder, fell and was seriously hurt. This state of facts give rise to the first question presented for our determination. It concerns the duty of care owed by a railroad company to trespassers.

Mills at the time of the accident was a trespasser on the defendant company's railroad. While it is true that a railroad company has a right to eject a trespasser from a train, it nevertheless owes a duty to the trespasser to exercise that right with ordinary care and prudence. Those in charge, having discovered the presence of a trespasser on the train are under a duty to refrain from affirmative acts of negligence. If they eject a trespasser from a train which is moving so rapidly as to endanger his personal safety, they have violated that duty and are therefore guilty of negligence for the results of which the railroad company is liable if injury is caused thereby. Enright v. Pittsburg Junct. R. R. Co., 198 Pa. 166.

When, as in this case, a train is in motion and an employee of the railroad company actually becomes aware of the presence of an infant trespasser thereon, any overt act done by the employee which is likely to cause injury to the trespasser, is a negligent act. Petrowski v. Phila. & R. Ry. Co., 263 Pa. 531.

It has been held in Thomas v. Traction Co., 270 Pa. 146, that although a boy is a trespasser he cannot lawfully be forced from a moving vehicle, by fright or otherwise. Here, then, we have a negligent act of the brakeman resulting in injury to the plaintiff for which injury the defendant company is liable.

But, there is a further fact which it is contended, excuses the defendant company from liability. While brakemen were required by the railroad company to drive off trespassers, they were forbidden to do so while the trains were in motion. This involves the question of the liability of the master where the servant is in the course of his employment, but, in the matter complained of, has acted contrary to the express command of his master.

The general rule of the master's liability is this. A master is liable for the tortious acts of his servant done in the course of his employment and within the general scope of his authority. Breenan v. Merchane & Co., 205 Pa. 258; Dunne v. Penna. R. R. Co., 249 Pa. 76; Phila., Wilmington & Baltimore R. R. Co. v. Brannen, 1 Sadler 369.

It will be noted that the test of the master's liability is the determination of the fact as to whether or not the act was done in the course of the servant's employment. These acts may be divided into three classes.

The first class comprises those acts which are performed by

the servant at the express command or request of the employer. If the wrongful act was authorized by the express command or request of the employer the employer is without question liable for the natural consequences of that act regardless of the degree of care exercised by the servant in performing the act. McClung v. Dearborne, 134 Pa. 396. The master will be liable also if he does not command the performance of the act but later ratifies it.

As to those of the second class, it is possible that the employer authorized the performance of a lawful act but in doing the act the servant performed in a negligent manner, and as a result of his negligence injury or damage results. The employer is liable in a civil action for that injury or damage. Brunner v. Telegraph Co., 160 Pa. 300; Shaw v. Reed, 9 Watts & S. 72; Penna. Telephone Co. v. Varnan, 15 Atl. 626.

The third class consists of those acts of a servant which are the results of an excessive or erroneous execution of a lawful authority in a negligent or wanton manner. The act of the brakeman in this case belongs in this class. To impute liability to the employer for the acts of this nature it is necessary to show that the act of the servant was of a kind which he was in fact authorized to perform and which if properly done, would be consistent with the performance of his duty.

The wrongful act complained of was the ejecting from the train, by the brakeman, of the plaintiff, a trespasser. It was the duty of the brakeman to drive off trespassers from the train on which he was employed and this being his duty, even though he had been ordered to perform this duty in a certain way, namely, while the train was not in motion, when he departed from the orders of his employer, he was, nevertheless, engaged in driving off a trespasser and was acting in the line of his employment. The fact that he was exceeding his authority was a disregarding of particular instructions but it was not such an interruption of the course of his employment as to determine or suspend the liability of his employer. So long as the servant acts within the scope of his employment, his employer is liable for the tortious acts of the servant even though the particular act be done in excess of his authority or even contrary to the express instruction of the employer. Dunne v. Penna. & R. R. Co., supra; Peterosky v. Phila. & R. R. Co., supra; Phila. & Reading R. R. Co. v. Derby, 14 How. (U. S.) 467.

As has been said, the criterion by which we determine the liability of the employer for the tortious acts of his servant is this. Was the servant at the time the particular act complained of was done, acting within the course of the employment? An affirmative answer to this question fastens liability upon the employer while if the question is answered in the negative, the employer is not

liable. We shall now look to the application of the rule.

In determining whether an employee was acting within the course of his employment when a specific act was done, the duties involved in the general scope of such employmene are the criteria and any privately imparted orders limiting those duties have no bearing. Third persons can see and know the general scope of the servant's employment, but since they have no means of knowing the secret orders given the servant, they are not affected by them. Peterosky v. Phila. & R. R. Co., supra; Phila., Wilmington & Baltimore R. R. Co. v. Brannen, 1 Sadler 369.

When the act in question, if properly done, would have been consistent with the performance of the servant's duty, it is presumed, unless there be evidence to the contrary, that the act was performed in the course of his employment. Bickley v. P. & R. Co., 257 Pa. 369.

If, in a given case the facts and inferences to be drawn from the tortious act are not in dispute, the court may as a matter of law, determine that the act was done in the course of the servant's employment. Brennan v. Merchant & Co., supra.

On the other hand, if there is evidence to the contrary or if the facts and the inferences to be drawn therefrom are in dispute, whether or not the act of the servant was done in the performance of his employment is a question of fact for the jury. Guinney v. Hand, 153 Pa. 404; Stidfole v. Phila. & R. R. R. Co., 261 Pa. 445.

These cases must be distinguished from those in which it is said that a master is not liable for the wilful or malicious acts of his employee. The word wilful in this connection is not used in the common meaning of the term. It means more than a mere voluntary or intentional act. It is used in the sense of being induced by a personal motive for the gratification of the actor's own will. In order to classify a specific act as wilful or malicious in this sense, the act must be not only a deviation from the line of the servant's duties but also a total departure from the course of the master's business. When the court says that a master is not liable for the wilful and malicious acts of the servant, it is by no means contravening the rule that a master is liable for the negligent or wanton acts of the servant done within the course of his employment because when an act is wilful or malicious as used in this sense, that specific act was not performed in the course of the servant's employment. Berryman v. P. R. R., 228 Pa. 621; Brennan v. Merchant & Co., supra.

A good guide to use in determining whether the particular act was within the scope of the servant's employment or whether the particual act was wilful or malicious is to answer the following questions. Did the employer put the agent in his place to do that

class of acts? Pollock on Torts, p. 52. Having ascertained that the employer is liable for the natural consequences of that act, regardless of any deviation of the servant from the prescribed manner of performance. If however the act is one of a kind, for the doing of which the employer did not put the servant in his place, the act is wilful and malicious and the employer is not liable.

In the present case the jury has determined this question. The jury found that the act of the brakeman was a negligent act and that the act was done in the performance of his employment. Applying the above rules to the facts of this case, the court is of the opinion that the defendant company is responsible to answer in damages for the injuries which were the natural and proximate consequences of the wrongful act of its employee in frightening the boy so that he fell from the train.

APPEAL DISMISSED.

OPINION OF THE SUPREME COURT

Mills, the plaintiff, was stealing a ride. He had no right to do this. It was proper for the brakeman, to see that he did not accomplish his purpose, if that could be done without undue violence to the body of the plaintiff, and without causing serious damage to him.

A menacing command to a boy of 14 years, might be enough to induce him to leave the top of the car. But, to leave the car, while in motion, was to do an act involving serious peril to the boy, and it was not difficult for a jury to find,injury resulting to him, that the causing of him, by threat or otherwise, to leave the car, the train being in motion, was a very improvident and reckless act.

The real question is, as to the liability of the Railroad Company, for this act of the brakeman. It was his duty, when possible without serious danger, to require a trespasser to leave the train, but it was his duty not to require this, unless the train could be stopped, or submission to the requirement could be otherwise made practicable without risk.

The principal thing attempted by the brakeman was in the line of his duty. It was modally done in a prohibited way. But, although the mode is of supreme importance, and the company would be better served by allowing a trespasser to continue on the car, than by adopting the forbidden or discountenanced method, the cases are too numerous, in which the employer has been held liable for injuries received by the employe's adoption of this method, to warrant any result other than that reached by the learned court below, which his able opinion has so well fortified. The brakeman was intent on the doing of a duty to his employer. The mode

adopted by him was, under the circumstances, unwise, and because of its unwisdom was not encouraged, was in fact discouraged, by the R. R. Co. It must take the risk of unwise, hasty, modally indefensible methods adopted in the effort honestly to serve the company. Dunne v. Penna. R. R. Co., 249 Pa. 76, and several cases cited by the learned court below, lend support to the decision. The judgment of the court below is therefore

AFFIRMED.

BOOK REVIEW

The Law of Unincorporated Associations and Business Trusts. By Sydney R. Wrightington, Second Edition, Little, Brown, & Co., Boston, 1923.

Seven years ago the first edition of this excellent work appeared. Between excessive taxes, blue sky laws and all kinds of governmental regulation, the resort to the corporation as the natural means of cooperative business has been made with more and more hesitation in recent years. A return to the unincorporated association or a resort to the "Massachusetts Business Trust" as a substitute is the alternative. The latter has been the subject of much discussion of late but the line between the attempted trust which may be construed to impose the liability of partnership upon those interested and the safe trust which eliminates personal liability has not been so clearly drawn as to make the business trust a popular expedient. The writer of this volume assures us that the line has now been so drawn that one may proceed to organize a business trust and know with assurance what provisions may be inserted with safety to the contributors of the capital. But it is conceded that the law is not yet made on many important questions raised by the terms of the elaborate trust deeds used to create these organizations. This book is as nearly a complete guide to lawyers given the task of drawing these instruments as can be furnished in the present state of the law. An appendix of nearly two hundred pages is devoted to forms with a full analysis of the various provisions inserted by many of the most conspicuous business trusts in their agreements and declarations of trust. The new edition is commended as an excellent working tool for practitioners in a new and impartial field.